

# BRACEWELL

July 6, 2018

VIA ECF

Honorable Valerie E. Caproni  
United States District Judge  
Southern District of New York  
40 Foley Square  
New York, NY 10007

Re: United States v. Ciminelli, S2 16 Cr. 776 (VEC)

Dear Judge Caproni:

As the attached Appendix demonstrates, from the outset, the government's theory has been that the defendants tailored the RFPs to favor LPCiminelli and COR. We therefore reiterate our request that the Court instruct the jury as follows:

Evidence that Mr. Ciminelli received a draft RFP before the RFP was publically issued is insufficient to prove the charges against him.

A conviction based on Mr. Ciminelli's receiving an early draft of the RFP would be a constructive amendment of the charges. See, e.g., United States v. Hassan, 578 F.3d 108, 133-34 (2d Cir. 2008).

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# BRACEWELL

July 6, 2018  
Page 2

Respectfully submitted,

/s/ Paul Shechtman

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## BRACEWELL

July 6, 2018  
Page 3

APPENDIX

Date	Document	Statement
9-20-16	Complaint (Dkt. 1) ¶ 68.	“In particular, as set forth below, (a) KALOYEROS caused Fort Schuyler to issue purportedly competitive requests for proposal (‘RFPs’) for companies to be named preferred developers for CNSE in Buffalo and Syracuse, where CNSE intended to undertake significant development projects paid for under the Buffalo Billion initiative and other state development programs; (b) KALOYEROS and Howe secretly tailored the RFPs so that the RFPs requested qualifications held by the Syracuse Developer and the Buffalo Developer; and (c) Fort Schuyler’s evaluation committee and Board of Directors evaluated and voted on the bids not knowing that KALOYEROS and Howe had prevented competing bids and designed the requirements to fit the Syracuse Developer and the Buffalo Developer.”
11-22-16	Indictment (Dkt. 49) ¶ 37.	“[T]o wit, KALOYEROS, AIELLO, GERARDI, CIMINELLI, LAIPPLE, SCHULER, and their coconspirators, devised a scheme to defraud Fort Schuyler in its award of significant taxpayer-funded development contracts by representing to Fort Schuyler that the bidding process for those contracts was fair, open, and competitive, when, in truth and in fact, KALOYEROS and Todd Howe used their official positions to secretly tailor the requests for proposals (‘RFPs’) for those contracts so that companies that were owned, controlled, and managed by AIELLO, GERARDI, CIMINELLI, LAIPPLE, and SCHULER would be favored to win in the selection process for the contracts.”

## BRACEWELL

July 6, 2018  
Page 4

Date	Document	Statement
11-22-16	Indictment (Dkt. 49) ¶ 43.	“[T]o wit, KALOYEROS, CIMINELLI, LAIPPLE, and SCHULER devised a scheme to defraud Fort Schuyler in its award of the Buffalo RFP by representing to Fort Schuyler that the bidding process for those contracts was fair, open, and competitive, when, in truth and in fact, and as CIMINELLI, LAIPPLE, and SCHULER well knew, KALOYEROS and Todd Howe secretly used their official position to tailor the RFP for the Buffalo Preferred Developer contract so that the Buffalo Developer would be favored to win in the selection process for the contract.”
5-11-17	S1 Indictment (Dkt. 162) ¶ 39	“[T]o wit, KALOYEROS, AIELLO, GERARDI, CIMINELLI, LAIPPLE, SCHULER, and their co-conspirators, devised a scheme to defraud Fort Schuyler in its award of significant taxpayer-funded development contracts by representing to Fort Schuyler that the bidding processes for those contracts were fair, open, and competitive, when, in truth and in fact, KALOYEROS and Todd Howe, in collaboration and in concert with AIELLO, GERARDI, CIMINELLI, LAIPPLE, and SCHULER, used their official positions to secretly tailor the requests for proposals (‘RFPs’) for those contracts so that companies that were owned, controlled, and managed by AIELLO, GERARDI, CIMINELLI, LAIPPLE, and SCHULER would be favored to win in the selection process for the contracts . . . .”

## BRACEWELL

July 6, 2018  
Page 5

Date	Document	Statement
5-11-17	S1 Indictment (Dkt. 162) ¶ 45	“[T]o wit, KALOYEROS, CIMINELLI, LAIPPLE, and SCHULER devised a scheme to defraud Fort Schuyler in its award of the Buffalo RFP by representing to Fort Schuyler that the bidding process for the Buffalo Preferred Developer contract was fair, open, and competitive, when, in truth and in fact, KALOYEROS and Todd Howe, in collaboration and in concert with CIMINELLI, LAIPPLE, and SCHULER, secretly used their official positions to tailor the RFP for the contract so that the Buffalo Developer, which was owned, controlled, and managed by CIMINELLI, LAIPPLE, and SCHULER, would be favored to win in the selection process for the contract . . . .”
6-30-17	Gov’t opp. to pretrial motions (Dkt. 264) at 47-48.	“As to the wire fraud charges contained in Counts One, Two, and Four, the Superseding Indictment clearly alleges the following facts, among others: (1) Kaloyeros, the Syracuse Defendants, the Buffalo Defendants, and Howe conspired to defraud Fort Schuyler by rigging the bidding on the RFPs while representing to Fort Schuyler that the process was fair, open, and competitive; (2) these co-conspirators engaged in the scheme to defraud so that Fort Schuyler would direct valuable contracts under its control to the Syracuse and Buffalo Developers; and (3) the co-conspirators exchanged emails and telephone calls in furtherance of the criminal scheme.”
6-30-17	Gov’t opp. to pretrial motions (Dkt. 264) at 50-51.	“As the Superseding Indictment plainly states, the defendants secretly tailored the RFPs so that they would be chosen by Fort Schuyler as preferred developers and ultimately awarded contracts worth hundreds of millions of dollars, while simultaneously representing to Fort Schuyler that the preferred developer bidding was open, fair, and competitive.”

## BRACEWELL

July 6, 2018

Page 6

Date	Document	Statement
6-30-17	Gov't opp. to pretrial motions (Dkt. 264) at 78.	"Count One charges the Buffalo Defendants, the Syracuse Defendants, and Kaloyeros with conspiring to commit wire fraud in connection with their fraudulent scheme to secretly tailor the preferred developer RFPs and thereby defraud Fort Schuyler."
6-30-17	Gov't opp. to pretrial motions (Dkt. 264) at 80.	"The fraudulent scheme charged in Count One involved the secret tailoring of the Buffalo and Syracuse RFPs to include qualifications favorable to the Buffalo Developer and the Syracuse Developer, respectively."
6-30-17	Gov't opp. to pretrial motions (Dkt. 264) at 90.	"The six defendants charged in Count One also are properly joined because their alleged crimes arose out of a common plan to defraud Fort Schuyler by secretly tailoring the RFPs to favor the Syracuse Developer and the Buffalo Developer."
9-19-17	S2 Indictment (Dkt. 321) ¶ 39.	"[T]o wit, KALOYEROS, AIELLO, GERARDI, CIMINELLI, LAIPPLE, SCHULER, and their co-conspirators, devised a scheme to defraud Fort Schuyler of its right to control its assets, and thereby exposed Fort Schuyler to risk of economic harm, by representing to Fort Schuyler that the bidding processes leading to the award of certain significant taxpayer-funded development contracts were fair, open, and competitive, when, in truth and in fact, KALOYEROS and Todd Howe, in collaboration and in concert with AIELLO, GERARDI, CIMINELLI, LAIPPLE, and SCHULER, used their official positions to secretly tailor the requests for proposals ('RFPs') for those contracts so that companies that were owned, controlled, and managed by AIELLO, GERARDI, CIMINELLI, LAIPPLE, and SCHULER would be favored to win in the selection process for the contracts . . . ."

## BRACEWELL

July 6, 2018  
Page 7

Date	Document	Statement
9-19-17	S2 Indictment (Dkt. 321) ¶ 45.	<p>“[T]o wit, KALOYEROS, CIMINELLI, LAIPPLE, and SCHULER devised a scheme to defraud Fort Schuyler of its right to control its assets, and thereby exposed Fort Schuyler to risk of economic harm, by representing to Fort Schuyler that the bidding process for the Buffalo Preferred Developer contract was fair, open, and competitive, when, in truth and in fact, KALOYEROS and Todd Howe, in collaboration and in concert with CIMINELLI, LAIPPLE, and SCHULER, secretly used their official positions to tailor the RFP for the contract so that the Buffalo Developer, which was owned, controlled, and managed by CIMINELLI, LAIPPLE, and SCHULER, would be favored to win in the selection process for the contract . . . .”</p>
10-13-17	Gov’t opp. to supp. pretrial motions (Dkt. 336) at 4.	<p>“As the defendants were well aware, the bidding processes leading to certain large, publicly-funded projects were designed so that Fort Schuyler would cede to Kaloyeros the authority to award those projects to any company that had been determined to be a ‘preferred developer.’ Kaloyeros and his co-conspirators gained control over Fort Schuyler’s assets by tailoring the RFPs so that the Buffalo and Syracuse Developers were selected as preferred developers, to whom Kaloyeros then was authorized to award valuable contracts without further oversight from Fort Schuyler’s board of directors.”</p>
4-25-18	Gov’t motions <i>in limine</i> (Dkt. 635) at 9.	<p>“The Government expects to prove that the Syracuse Defendants and the Buffalo Defendants (Ciminelli, Michael Laipple, and Kevin Schuler) each bribed Howe, an agent of the College of Nanoscale Science and Engineering (‘CNSE’), to rig the RFPs issued by Fort Schuyler. Together with Kaloyeros, the defendants tailored and manipulated the Syracuse and Buffalo RFPs to steer those awards to COR Development and the Buffalo Developer, respectively. The defendants succeeded, and those companies were deemed ‘preferred developers’ of Fort Schuyler and CNSE.”</p>

## BRACEWELL

July 6, 2018  
Page 8

Date	Document	Statement
5-18-18	Gov't opp. to defendants' motions <i>in limine</i> (Dkt. 663) at 25.	" <i>Slay</i> is not analogous to the instant case. The RFP process did not lead to an arms'-length contract negotiation between the developers and disinterested Fort Schuyler Board members or employees. The developer defendants knew that winning the RFP would lead to huge State-funded contracts. The tailored RFP process prevented Fort Schuyler from fairly considering other bids, whether or not those bids may have been more suitable and beneficial to Fort Schuyler, and resulted in the coconspirators sitting at the table together for contract discussions. . . . The Fort Schuyler Board relinquished valuable rights with respect to future projects that the <i>Slay</i> city council did not when the Board ratified the RFP processes without awareness of the behind-the-scenes bid rigging."
5-21-18	Gov't <i>Daubert</i> motions (Dkt. 668) at 1-2.	"The Government has alleged, and expects to prove at trial, that defendants Steven Aiello and Joseph Gerardi, executives at a real estate development firm based in Syracuse, New York (the 'Syracuse Developer'), and defendants Louis Ciminelli, Michael Laipple, and Kevin Schuler, executives at a real estate development firm based in Buffalo, New York (the 'Buffalo Developer') conspired with defendant Alain Kaloyeros, the de facto head of Fort Schuyler Management Corporation ('Fort Schuyler'), a non-profit real estate corporation, in a bid-rigging scheme. . . . Kaloyeros, with the assistance of a close advisor, Todd Howe, oversaw the drafting of the RFPs and, unbeknownst to Fort Schuyler and its Board of Directors, secretly tailored the RFPs so that the RFPs requested qualifications held by the Syracuse Developer and the Buffalo Developer. As a result, Fort Schuyler's evaluation committee and Board of Directors evaluated and voted on the bids related to the Syracuse and Buffalo projects not knowing that Kaloyeros and Howe had secretly designed the requirements of the respective RFPs to fit the Syracuse Developer and the Buffalo Developer."



## BRACEWELL

July 6, 2018  
Page 9

Date	Document	Statement
5-21-18	Gov't <i>Daubert</i> motions (Dkt. 668) at 4.	"As stated earlier, the Government alleges that the defendants participated in a conspiracy to deceive Fort Schuyler and its Board of Directors into believing that the RFP processes Fort Schuyler used to select a preferred developer for its development projects in Buffalo and Syracuse were fair, open and competitive when, in truth and in fact, the RFPs related to those projects had been secretly tailored by the defendants to favor the Buffalo Developer and the Syracuse Developer."
5-21-18	Gov't <i>Daubert</i> motions (Dkt. 668) at 6.	"From this evidence, the jury will be able to reach its own conclusion about whether the Buffalo and Syracuse RFPs were secretly tailored to deceive Fort Schuyler's Board of Directors."
5-29-18	Gov't <i>Daubert</i> opp. (Dkt. 688) at 2.	"Rather, the Indictment alleges that the defendants participated in a conspiracy to defraud Fort Schuyler by concealing the fact that the RFPs at issue were rigged to benefit the Buffalo and Syracuse Developers."
5-29-18	Gov't <i>Daubert</i> opp. (Dkt. 688) at 4-5.	"The defendants have been charged with participating in a wire fraud conspiracy, not a procurement fraud conspiracy. Accordingly, the relevant question for the jury is whether the defendants deceived Fort Schuyler and its Board of Directors into believing that the RFP processes Fort Schuyler used to select a preferred developer for its development projects in Buffalo and Syracuse were fair, open and competitive when, in truth and in fact, the RFPs related to those projects had been secretly tailored by the defendants to favor the Buffalo Developer and the Syracuse Developer."

## BRACEWELL

July 6, 2018  
Page 10

Date	Document	Statement
6-6-18	Final pretrial conf., Tr. 201-03.	<p>THE COURT: I don't think this is about [whether] anyone felt excluded. I think maybe lots of companies may have felt excluded. The real point [is] whether the proposal -- the request for proposal that was issued, in fact, which I thought this was the government's theory, had been tailored to the point that there really were -- there was only one -- there was only one company in each city that really could fit the bill.</p> <p>...</p> <p>MR. COFFEY: You still have a question pending, by the way. You've asked the government a question. I thought that was your theory. And they haven't answered that.</p> <p>THE COURT: The theory that the RFP was tailored to only be response -- so that only COR -- so that it was clear that COR and Ciminelli would win.</p> <p>MR. BOONE: It was tailored to favor them, yes."</p>
6-16-18	Gov't opening statement, Tr. 37.	<p>"Those contracts were supposed to go to the winners of a fair and open competition, but that didn't happen. It didn't happen because this man, Alain Kaloyeros, made sure that the fix was in. Kaloyeros rigged the competition to make sure that the companies he liked would win those massive state contracts. And who benefited from this fraud? Who was hand picked by Kaloyeros? The other three defendants: Louis Ciminelli, Steven Aiello, and Joseph Gerardi. These men were the owners of construction companies in Buffalo and Syracuse. They wanted state contracts, and they wanted the millions of dollars attached to those contracts, so Ciminelli, Aiello, and Gerardi schemed with Kaloyeros to rig the bid."</p>
6-16-18	Gov't opening statement, Tr. 42.	<p>"The defendants had other ideas. They corrupted the RFP process and rigged the competition. How did they do that? Well, you'll learn that they added requirements into the RFP that were good for their companies."</p>

## BRACEWELL

July 6, 2018

Page 11

Date	Document	Statement
6-23-18	Gov't motion to admit stipulations (Dkt. 750) at 1.	"As the Court is well aware, the scheme to defraud Fort Schuyler Management Corporation involved the rigging of requests for proposals, which led to the granting of preferred developer status and then construction contracts to the defendants' companies."
6-28-18	Rule 29 arguments, Tr. 2028.	"MR. PODOLSKY: But the question is did they understand that there was a generally a common purpose, did they join in the conspiracy that was between Alain Kaloyeros and Todd Howe to rig these bids. I think the evidence shows that they did."
6-28-18	Rule 29 arguments, Tr. 2042.	"MR. PODOLSKY: . . . What's clear from the charging language is that the government has charged that the defendants have engaged in a scheme to defraud Fort Schuyler by exposing it to economic risk. There is then some to wit language to put them on notice it relates to the tailoring of these RFPs."
7-2-18	Charge conf., Tr. 2335.	"MR. ZHOU: Yes, your Honor. With respect to line 20 and 21 on page 14, we think -- our position that the RFP is being broad enough to attract well-qualified companies is not a defense. Our allegation is that to prove up the charge, we have to prove that the defendants had the intent to tailor these RFPs. And so the fact -- whether or not they ended up being broad enough to attract well-qualified companies doesn't speak to that."